TOGHOTTHELE CORP.

IBLA 85-652 Decided January 16, 1987

Appeal from a decision of the Fairbanks District Office, Fairbanks, Alaska, Bureau of Land Management, dismissing a protest to proposed right-of-way F-84364 for operation and maintenance of water well facilities.

Affirmed in part; vacated in part, and remanded.

1. Water and Water Rights: Generally -- Water and Water Rights: State Laws

   When considering applications for rights-of-way privileges the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976 -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

   The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over, upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 176(a) (1982).

3. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976 -- Alaska Native Claims Settlement Act: Native Land Selections: Village Selections

   BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native Village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the

village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing the right-of way only if the public interest outweighs the objections of the village.

4. Federal Land Policy and Management Act of 1976: Rights-of -Way--Fees--Rights-of-Way: Appraisals

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

APPEARANCES: Lloyd Benton Miller, Esq., Anchorage, Alaska, for appellant; Julia B. Bockmon, Esq., and Steven W. Silver, Esq., Anchorage, Alaska, for City of Nenana; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Alaska Region, Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Toghotthele Corporation (Toghotthele) has appealed the decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated April 26, 1984, dismissing its protest to proposed issuance of right-of-way F-84364 sought by the city of Nenana (Nenana) for the expansion of its water facility. 1/ Nenana's expansion plans include drilling a well and constructing a water storage facility on land in the NE 1/4 of block 15, T. 4 S., R. 8 W., Fairbanks Meridian, U.S. Survey 1127, Alaska, which land has been approved for conveyance to Toghotthele, a Native village corporation organized pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1628 (1982).

1/ BLM also approved the right-of-way stating:

"The grant will not go into effect until the City has accepted, by signature, the grant terms and conditions and it is countersigned by the authorized officer of the Bureau of Land Management.

"The City is allowed thirty (30) days from receipt of the proposed grant to sign * * *."

The proposed right-of-way grant stated that there was to be no rental fee.

A June 3, 1985, memorandum to the file states that Nenana signed the right-of-way grant and returned it to BLM on or about May 5, 1985; that the document had been misplaced by BLM; and that it had not been countersigned by BLM. The April 26, 1985, decision stated that the right-of-way would not be effective pending a decision by this Board on any appeal.

In late 1983 and early 1984, Nenana developed plans to expand its 5-year old water facility located on the SE 1/4 of block 15. Nenana determined that the most practical site for this project was the NE 1/4 of block 15. By letter dated May 2, 1984, Nenana's representative submitted to Toghotthele's chairperson a formal request for permission to "utilize * * * the NE 1/4 of Block 15 for the water treatment plant expansion." Nenana's request was subsumed by negotiations between the parties concerning the comprehensive questions of whether Toghotthele may select lands within 2 miles of Nenana under section 22(1) of ANCSA, 43 U.S.C. § 1621(1) (1982), and whether Toghotthele must reconvey those lands to Nenana under section 14(c) of ANCSA, 43 U.S.C. § 1613(c) (1982). 2/ Due to extended and unsuccessful negotiations between the parties regarding Toghotthele's entitlement to lands under section 22(1), and Nenana's right to reconveyance under section 14(c), Toghotthele refused to consent to the right-of-way at issue in this appeal. Notwithstanding this state of affairs, in August 1984 Nenana proceeded to occupy and excavate the NE 1/4 of block 15. Upon investigating the site, BLM issued a trespass notice to Nenana. Nevertheless, Nenana proceeded with its construction activities through November 1984, during which time BLM served four additional trespass notices upon Nenana.

A BLM realty specialist orally directed Nenana to apply for a right-of-way upon issuance of the first BLM trespass notice in August 1984, and Nenana submitted a letter application on August 27, 1984, followed by a formal right-of-way application on August 31, 1984, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLMPA), 43 U.S.C. § 1761 (1982). Subsequently, the Deputy State Director requested a formal report on Nenana's application. (Memorandum from BLM Deputy State Director to Fairbanks District Manager, dated Sept. 26, 1984.) This request was made in accordance with BLM Instruction Memorandum (IM) No. AK-76-237, dated November 9, 1976, which provides that if the Native corporation is opposed to the right-of-way, the case file and supporting documentation must be forwarded to the State Director, who will make a final decision on the application.

In this case, the Fairbanks District Manager issued the appealed decision on April 26, 1985. The right-of-way authorized by BLM reflected the recommendation of the Fairbanks District Office, concurred in by the BLM

2/ This dispute is the subject of an appeal by Nenana, docketed IBLA 85-688, in which Nenana argues that BLM improperly decided to convey lands to Toghotthele that are within 2 miles of Nenana's boundaries. That decision, according to Nenana, is contrary to section 22(1) of ANCSA, 43 U.S.C. § 1621(1), which provides that "[n]otwithstanding any provision of this chapter, no Village or Regional Corporation shall select lands which are within two miles from the boundary, as it exists on December 18, 1971, of any home rule or first class city." Regulation 43 CFR 2650.6(a) excepts from the coverage of section 22(1) of ANCSA a village corporation organized by Natives of a community which is itself a first class or home-rule city. Nenana argues that the statutory provision is absolute and that the regulatory exception is contrary to law.

Both Toghotthele's appeal, which is the subject of this decision, and Nenana's appeal, derive from what is termed by BLM as a "bitter dispute" between the parties.

State Director, which was to issue a short-term right-of-way, for 5 years, based upon a balancing of BLM's responsibilities to Toghotthele and to the public. The April 26, 1985, decision states:

> We have decided that the city's arguments are compelling and that the public benefit is best served by the proposed development which will provide for sanitary water treatment, a larger safety margin for firefighting and well failure, and community growth. Pursuant to the Bureau of Land Management's Interim Management Plan [IM No. AK-76-237], Toghotthele Corporation's objection is treated as a protest, which is hereby dismissed for the reasons mentioned above with the right of appeal.

Toghotthele advances three grounds for appealing BLM's decision approving the right-of-way: (1) Title V of FLPMA, 43 U.S.C. § 1761 (1982), does not authorize the issuance of rights-of-way for the activities proposed by Nenana, i.e., the drilling of a well for purposes of removing water from lands selected by Toghotthele; (2) Title V of FLPMA does not authorize the issuance of any rights-of-way over ANCSA Native-selected lands; and (3) even if BLM has such authority, it abused its discretion (a) in determining to issue right-of-way F-84364, given the competing interests at stake and the lack of any compelling need for the right-of-way, and (b) in determining to issue the right-of-way free of rental. We will examine each of these arguments, as well as the counter-arguments submitted by counsel for BLM and Nenana, in turn.

[1] Nenana's application characterizes the requested right-of-way as one for the "expansion of water treatment plant facilities," involving (1) the placement of fill to elevation 359, (2) drilling one 8-inch diameter well, (3) erecting one 280,000 gallon water storage tank, and (4) construction of a frame building with water treatment facilities contained. Toghotthele's first challenge to this right-of-way relates to its scope:

> The fundamental flaw in the decision below is that the right-of-way procedure employed is inappropriate and unlawful where the applicant seeks not a true less-than-fee use of the land (such as a linear right-of-way for a pipe, transmission line, etc.) but to remove and sell valuable property interests in the land such as its water, other minerals or its vegetative materials.

(Statement of Reasons (SOR) at 9).

Toghotthele argues that the legislative history of section 103(f) of FLPMA, 43 U.S.C. § 1702(f) (1982), which defines the term "right-of-way" for purposes of FLPMA, 3/ makes clear that a right-of-way must be "over, upon or through the public lands," citing H.R. Rep. No. 1163, 94th Cong., 1st Sess. 20, reprinted in 1976 U.S. Code Cong. & Ad. News 6175, 6194 (SOR at 9).

3/ Section 103(f) of FLPMA states that '[ ]he term 'right-of-way' includes an easement, lease, permit, or license to occupy, use, or traverse public lands granted for the purpose listed in subchapter V of this chapter."

Toghotthele argues that a right-of-way which authorizes the "removal and exploitation of a resource, particularly such a valuable resource as water," as well as "the drilling of a well," exceeds the authority delegated to the Department under FLPMA (SOR at 10). Moreover, Toghotthele asserts that Nenana has not filed an application to appropriate water at this site with the Alaska Department of Natural Resources, and that, in accordance with Alaska Admin. Code tit. 11, § 93.040(c)(2) (Oct. 1983), such application must be accompanied by proof that the applicant has a present possessory interest in the property where the water is to be beneficially used. Toghotthele concludes that the effect of the right-of-way is to "[rob] the Native corporation of one of the most precious values this land has" (SOR at 12).

Both BLM and Nenana respond that Toghotthele misunderstands the scope of the right-of-way, and they agree that BLM cannot authorize the appropriation of State water. "That is an independent matter to be resolved in accordance with State laws" (Answer of BLM at 3). Nenana states that "[t]his appeal will determine the possessory interest upon which the City may file its application for appropriation of water rights under Alaska law" (Answer of Nenana at 15). Thus, Nenana asserts that assuming the right-of-way grant is affirmed, Nenana "may file and under State law will most certainly obtain a certificate of appropriation." Id.

Section 501(a)(1) of FLPMA, 43 U.S.C. § 1761(a)(1) (1982), authorizes issuance of "rights-of-way over, upon, under, or through [public] lands for - (1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water." 4/ (Emphasis added.) While the implementing regulations make clear that a right-of-way grant does not include the right to remove any mineral or vegetative materials, they do not expressly address water rights. See 43 CFR 2801.1-1(d).

However, this Board confronted the issue raised by Toghotthele in East Canyon Irrigation Co., 47 IBLA 155 (1980), wherein BLM rejected a right-of-way application to drill two water wells, construct a 12-foot road, and two pump houses, and to convey water therefrom off public land. In response to the charge that BLM was improperly adjudicating water rights, a matter committed to State law, the Board stated:

> BLM's involvement in these cases is not, under any construction, an attempt to divest or readjudicate water rights decreed by the courts of Utah. BLM's nexus to the instant cases is grounded solely on the fact that the well sites are situated on Federal

4/ Regulation 43 CFR 2800.0-7(a), which reiterates section 501(a)(1) of FLPMA, provides that BLM's authority extends to:

"Issuing, amending or renewing right-of-way grants for necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under or through public lands, including but not limited to: (1) Reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels and other facilities and systems for the impoundment, storage, transportation or distribution of water." (Emphasis added.)

> land which necessitates, under applicable Federal law, applications for rights-of-way in order to occupy, operate, and maintain the facilities proposed by appellant in exercise of its right to a portion of waters of Johnson Creek. When considering an application for determination of right-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of State law. Broken H. Ranch Co., 33 IBLA 386 (1977); Harold C. Brown, A-30536, 73 I.D. 172 (May 31, 1966); Hatch Brothers Co., A-27525 (Jan. 13, 1958).

47 IBLA at 162. Accordingly, we reject Toghotthele's argument that in issuing right-of-way F-84364 BLM would be improperly adjudicating water rights, since those rights must be decided under State law.

[2] Secondly, Toghotthele argues that BLM's authority to issue rights-of-way under Title V of FLPMA does not extend to lands selected by a Native village corporation under ANCSA. Section 501(a)(1) of FLPMA, 43 U.S.C. § 1761(a)(1) (1982), the provision pursuant to which the challenged right-of-way was issued, authorizes the Secretary to grant, issue, or renew rights-of-way "with respect to the public lands." Toghotthele maintains that section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1982), expressly excludes lands subject to a Native village selection from the definition of "public lands." Section 103(e) provides in part as follows:

> The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except --
>
> (1) lands located on the Outer Continental Shelf; and
>
> (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

The exclusion embodied in section 103(e)(2), according to Toghotthele, "is precisely tailored to the subject lands: the north-half of Block 15 is owned by the United States (because it has not yet been conveyed), it is administered by the BLM, and it is being held for the benefit of Toghotthele's Native shareholders until patent is issued" (SOR at 14).

Toghotthele asserts that "[t]he exclusion of these particular lands from the coverage of FLPMA is particularly compelling since they are core township lands" (SOR at 15 n.14) (Emphasis in original.) Toghotthele recites the following scheme, embodied in key provisions of ANCSA, in support of this proposition: (1) under section 11(a)(1)(A) of ANCSA, 43 U.S.C. § 1610(a)(1)(A) (1982), Congress withdrew all Federal lands "in each township that encloses all or part of any Native Village"; (2) under section

12(a)(1) of ANCSA, 43 U.S.C. § 1611(a)(1) (1982), Congress mandated that "each Native village * * * shall select * * * all of the township or townships in which any part of the village is located * * *"; and

(3) in section 14(a) of ANCSA, 43 U.S.C. § 1613(a) (1982), Congress mandated that the Secretary "shall issue to the Village Corporation" a patent covering the corporation's acreage entitlement, specifically providing that "[t]he lands patented shall be those selected by the Village Corporation pursuant to section 12(a) of this title." Thus, Toghotthele concludes, its selection of the subject land is secure, the land is owned by the United States, and while withdrawn, is held for Toghotthele's benefit until conveyance under section 14(a) of ANCSA. As such, Toghotthele argues, the subject land is excluded from FLPMA's reach.

Toghotthele's argument ignores section 22(i) of ANCSA, 43 U.S.C. § 1621(i) (1982), which provides in clear terms:

> Prior to a conveyance pursuant to section 1613 of this title, lands withdrawn by or pursuant to sections 1610, 1613, and 1615 of this title shall be subject to administration by the Secretary, * * * under applicable laws and regulations, and [his] authority to make contracts and to grant leases, permits, rights-of-way, or easements shall not be impaired by the withdrawal. [Emphasis added.]

BLM's authority to grant rights-of-way is embodied in Title V of FLPMA. Regulation 43 CFR 2650.1(a)(1) is identical in substance to section 22(i) of ANCSA, but subsection (a)(2) adds the following proviso: "Prior to the Secretary's making contracts or issuing leases, permits, rights-of-way, or easements, the views of the concerned regions or villages shall be obtained and considered * * *."

We rule that BLM's authority under section 22(i) of ANCSA and 43 CFR 2650.1(a) to issue the subject right-of-way is beyond Toghotthele's challenge. In Cape Fox Corp. v. United States, 456 F. Supp. 784 (D. Alaska 1978), rev'd in part and rem. on other grounds, 646 F.2d 399 (9th Cir. 1981), the District Court addressed the following question: "[W]hat obligations does the United States owe to village corporations prior to actual conveyance through land selections made under the Settlement Act, or alternatively, what legal interests does a village corporation possess in selected land prior to conveyance by the federal government?" 456 F. Supp. at 798. While Cape Fox concerned, inter alia, the specific question of whether a village corporation possessed authority to maintain a trespass action with respect to village-selected lands administered by the Forest Service, its interpretation of section 22(i) of ANCSA applies equally to lands administered by BLM under that provision. The District Court examined the legislative history of section 22(i) and concluded that "all proposals which might have given Native corporations enforceable legal right[s] in selected lands prior to conveyance were rejected." 456 F. Supp. at 801. Furthermore, the District Court stated that "Congress did not intend to provide Native corporations with the right to

veto management decisions made by the United States after withdrawal and prior to selection, nor did it intend to give Native corporations a right to control the selected land prior to conveyance." Id.

As noted by the District Court in Cape Fox, section 22(i) should be read in conjunction with section 2 of ANCSA, 43 U.S.C. § 1601(b), which expresses the general policy of "maximum participation by Natives in decisions affecting their rights and property." BLM's promulgation of 43 CFR 2650.1(a)(2) reflects that congressional policy. Thus, while the Native corporation may not control selected land prior to conveyance, any decision by BLM to grant a right-of-way affecting such land must be cognizant of the views of the concerned village under 43 CFR 2650.1(a)(2). See Nelbro Packing Co., 63 IBLA 176 (1982). The record shows that the views of Toghotthele were well known to BLM.

[3] Next, we address Toghotthele's claim that BLM abused its discretion in authorizing the right-of-way. A BLM decision granting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no overriding reason to disturb the decision is shown. Nelbro Packing Co., supra at 185; East Canyon Irrigation Co., supra at 162.

In deciding to issue right-of-way F-84364, BLM followed the procedures prescribed in IM No. AK-76-237, concerning interim management practices for lands withdrawn under ANCSA, such as those at issue (SOR, Attachments 4a-7a). That document incorporated the procedures set forth in a memorandum from the Director, BLM, to the Alaska State Director, BLM, dated December 29, 1972, which initially set guidelines for the interim administration of lands withdrawn pursuant to ANCSA. The 1972 Guidelines provide that "[t]he general objective for interim administration is to avoid encumbrances and impacts on the land which might jeopardize (1) interests of the Native beneficiaries, * * *. However, encumbrances may be allowed if they are necessary for the general welfare of the people of Alaska and in the general public interest" (SOR, Attachment 8a at I.A.; emphasis added). They further state, "[T]he time period and volume of resource material involved in the proposed lease or permit should be kept to a minimum consistent with the need to be served. The duration of the permit or lease should be related to the possibility of selection or contemplated transfer of management" (Id. at I.C.; emphasis added).

IM No. AK-76-237 more specifically spells out the manner in which BLM is to balance the competing interests in determining whether to issue a right-of-way affecting ANCSA-selected lands:

> II. A. Native corporation views, not consent, will be obtained except on former reserves where consent is required (43 CFR 2650.1 (a)(2)). Views or consent, in writing, must be secured by the applicant from the corporation having selected the affected land. If a village selection is involved, the applicant should keep the region advised. * * *

* * * * * * *

> If the applicant is unable to obtain written views or consent, efforts to obtain them must be thoroughly documented and forwarded to the official with whom the application or renewal request was originally filed. In such cases, or if the corporation is opposed to the application, the casefile and supporting documentation will be forwarded to the [State Director]. * * * Supporting evidence must include a report by the [District Manager] on the items in II. C., a summary of land status, a thorough discussion by the applicant as to why and how the public interest and benefit is involved and what alternatives are available, and the recommendations of the issuing officer. A final decision will be made personally by the [State Director or Associate State Director]. [Emphasis in original.]

(SOR, Attachment 6a-7a).

BLM's decision to issue the contested right-of-way reflects compliance with the procedures and considerations specified in the 1972 Guidelines and IM No. AK-76-237. BLM's District Manager requested the Land Report and Decision Record (Land Report), dated February 13, 1985, which recommends the decision eventually adopted by the State Director. In addition, the District Manager requested in an October 24, 1984, letter to Nenana that the city provide written support for its right-of-way request. The Land Report offers the following appraisal of Nenana's justifications for the right-of-way:

> The City submitted on November 1, 1984 justification for why and how the public interest, safety and/or benefit is involved, and a discussion of alternatives for expanding the water treatment plant. They have made a very good justification for why a water treatment plant expansion should occur on the subject lands. Their justification, in short, is that their existing facility is on adjacent lands and expansion can easily occur onto the subject lands. It appears that the existing facility was designed to be easily expanded onto the subject lands.
>
> I do not believe the City has justified the necessity for <u>immediate</u> expansion of the water treatment plant in defiance of a trespass notice ordering them to stop. Their justification is based on cheaper treatment of water with less iron, a larger safety margin for fires and well failure, and the expectation of community growth. These are very good reasons to expand the water treatment plant, but are not so compelling that they could not wait for proper authorization. The present facility is perfectly adequate, barring unforeseen catastrophe.
>
> The only justification for immediate expansion of the treatment plant which is reasonably compelling is the public safety

> aspect. The City has survived four years with the existing facility and could survive a few more years. The demand for water has increased about 20% since the existing facility was built in 1980. This does not exceed the capacity of the system. [Emphasis in original.]

(Answer of BLM, Exh. 2 at 5).

After weighing various alternatives, the Land Report recommended the action ultimately approved by the State Director:

> I recommend that a short-term right-of-way be granted to the City for a term of five years over the objections of Toghotthele. The grant may not be renewed. This variation of the proposed action should be adopted because the City has shown some public benefit and safety from the water treatment plant expansion; and that any expansion should occur on the subject lands.
>
> The term of five years will protect the public benefit and safety for that period, and the Bureau will have fulfilled its responsibilities to the public. The five year term will hopefully be enough time for the City and Toghotthele to settle their differences.

(Answer of BLM, Exh. 2 at 6).

The Supplemental Land Report, prepared March 27, 1985, "adds new information and expands upon the justification supporting the recommendation to grant a right-of-way to the City of Nenana for five years, over the objections of Toghotthele Corporation" (Answer of BLM, Exh. 3 at 2). This document details four bases for recommending the right-of-way: (1) expanding the existing facilities onto an adjacent site is more cost effective than constructing another treatment plant at a separate location; (2) the water treatment process, involving the removal of excessive iron, will be enhanced by the new, deeper well; (3) the water plant expansion plans provide a larger safety margin for firefighting and well failure; and (4) the expansion is expedient in view of expected community growth. Further, the Supplemental Land Report places into perspective the use of the phrase, "adequate, but not compelling," which had been used in the Land Report, in evaluating Nenana's justifications for expanding onto the subject land:

> The LADD [Lands Action Decision Document a.k.a. Land Report] stated that the reasons given were not compelling justification for immediate expansion of the water treatment plant. Compelling justification for expansion would be a situation in which the crisis the City is seeking to avoid by expanding the plant now, has already occurred. This crisis would probably occur if there were 200 hook-ups to the unexpanded system. The consequent loss in quantity, quality and reliability of the water service would result in adverse political, economic, and

> public reactions. The situation in Nenana has not reached these disastrous proportions.
>
> The opposite end of the spectrum would be a case in which the expansion is clearly unnecessary and a waste of public funds. This is not the situation in Nenana.
>
> At some point between these two extremes, the public benefit is sufficient to justify issuing a right-of-way over the objections of Toghotthele. This is the reason the phrase, "adequate, but not compelling", is used in the LADD. It means the crisis stage has not been reached, but justification for the project is sufficient to warrant granting a right-of-way over Toghotthele's objections.

(Answer of BLM, Exh. 3 at 4).

By memorandum dated April 1, 1985, the Fairbanks District Manager requested the concurrence of the State Director in the decision to issue the right-of-way for 5 years, over Toghotthele's objections. In that memorandum, the District Manager explained that such a decision must represent a balancing of interests of Toghotthele against the benefit to and safety of the public. The District Manager stated:

> The proposed right-of-way benefits the public by providing for sanitary treatment of water, a larger safety margin for firefighting and well failure, and community growth. The proposed site is the best available because the adjacent existing plant can easily be expanded onto the site, resulting in lower construction and maintenance costs.
>
> The Lands Action Decision Document (LADD) prepared for this case recommends that a right-of-way be granted for five years. We believe this recommendation strikes a proper balance between our responsibilities to Toghotthele and the public.

(Answer of BLM, Exh. 4 at 1).

Finally, the Fairbanks District Manager's April 26, 1985, decision summarized the procedures followed by BLM in adjudicating Toghotthele's objections to the right-of-way, as well as the public interest factors which, in BLM's view, outweighed Toghotthele's objections. The decision concluded:

> We have decided that the city's arguments are compelling and that the public benefit is best served by the proposed development which will provide for sanitary water treatment, a larger safety margin for the firefighting and well failure, and community growth.

(Decision at 2).

Toghotthele argues that Nenana failed to establish a compelling public safety need sufficient to overcome Toghotthele's objections. However, as counsel for Nenana points out, the standard to be applied is whether there is a public interest in granting a right-of-way sufficient to outweigh Native objections. Nelbro Packing Co., 63 IBLA at 188. While Toghotthele challenges the factual bases for BLM's April 26, 1985, decision, Nenana responds point for point, arguing that Toghotthele's analysis reflects a misunderstanding of the city's water needs. Based upon our review of the record we conclude that BLM reasonably decided that the water treatment expansion would serve the public interest in that it would provide for (1) sanitary water treatment, (2) a larger safety margin for firefighting and well failure, and (3) expected community growth.

Additionally, Toghotthele maintains that the right-of-way authorizes a use of the subject land which is "exclusive," creating "the very 'encumbrances' and 'impacts on the land' which the Bureau's own Guidelines mandate be avoided as threatening to 'jeopardize [the] * * * interests of the Native beneficiaries'" (SOR at 32, quoting the 1972 Guidelines, I.A.). The city responds that "the guidelines permit encumbrances if they are necessary for the general welfare of the people of Alaska and in the general public interest" (Answer of Nenana at 19). In this connection, Nenana points out that Native shareholders constitute nearly half of the population of the city, and that its treatment expansion plans would benefit the interest of the Native shareholders, as well as the rest of the citizens of Nenana (Answer of Nenana at 19-20). Moreover, as BLM notes in its Land Report, if Nenana and Toghotthele have not resolved their longstanding disputes about the right-of-way at the end of the 5-year period, Toghotthele can then claim the improved land, assuming Toghotthele prevails on the section 14(c) reconveyance issue (Answer of BLM, Exh. 2 at 6-7).

We conclude BLM did not abuse its discretion in approving the right-of-way grant to Nenana.

[4] Toghotthele's final argument is that BLM abused its discretion in authorizing a right-of-way grant without requiring payment of fair market rental value. Specifically, section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1982), provides in part that "[r]ights-of-way may be granted, issued or renewed to a Federal, State or local government * * * including free use as the Secretary concerned finds equitable and in the public interest." Regulation 43 CFR 2803.1-2 similarly provides that:

> (c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:
>
> (1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

Toghotthele faults BLM for its failure "to give even the slightest of consideration to whether or not the right-of-way should be granted for its fair market value * * *. No discussion of this issue can be found anywhere

in the decision" (SOR at 35 (emphasis in original)). Toghotthele argues that Nenana does not qualify for a fee waiver under the rule enunciated and applied in Tri-State Generation & Transmission Association, 63 IBLA 347, 354, 89 I.D. 227, 231 (1982), that "free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large." According to Toghotthele, Nenana falls within the definition of a "municipal utility" whose principal source of revenue is customer charges, and accordingly is not entitled to a rent reduction. Toghotthele supports its contention that Nenana operates a municipal utility with a report entitled "Analysis of User Rates and Charges for Water and Sewer System," which shows that total 1982-83 operating and maintenance costs for the combined system were $ 93,040; income derived solely from customer charges for the same period was $ 78,650; and the $ 14,390 shortfall between operation and maintenance revenue requirements and customer service charge income resulted in the city's raising customer rates so that the system might be funded solely by service charge income (SOR 38, n.41).

Both BLM and Nenana distinguish Tri-State Generation, supra, on the basis that it dealt with a utility cooperative and not a local government. However, this Board recently decided City of Redding, 91 IBLA 82 (1986), which involved the sole question of whether the city of Redding qualified for the exemption found in 43 CFR 2803.1-2(c)(1). BLM granted the city of Redding a right-of-way for constructing a water treatment plant on a Federally owned 11-acre parcel, but imposed fair market rental for the right-of-way. The city of Redding contended that it was protected under 43 CFR 2803.1-2(c)(1), since it qualified as a local governmental entity seeking to utilize property in the public domain for its citizens and others.

The Board ruled that "[s]ince the City of Redding is not an agency of the Federal Government, and the cost of collection not unduly large, BLM properly determined the City of Redding does not qualify for exemption from rental fees." 91 IBLA at 84. While the Board in City of Redding noted that the Tri-State Generation line of cases did not address the issue of whether a municipal government should be afforded reduced charges, it concluded that there could be no argument that the regulation excluded from free use or reduced charges municipal utilities whose principal source of revenue was customer charges. Id.

We rule that within the analysis of City of Redding, Nenana "seeks to obtain the right-of-way to facilitate its treatment and delivery of water to homes and businesses in and around [Nenana], and thus the purpose for the right-of-way must be for use by a municipal utility." Id. Toghotthele has submitted evidence, which Nenana has not disputed, that the principal source of revenue for Nenana's water treatment plant is customer charges. Thus, the water system at issue is operated by Nenana, and the principal source of revenue for providing water services is customer charges. 5/

5/ The Board stated in City of Redding, 91 IBLA at 85: "There is no justifiable reason, as a matter of policy, to differentiate between a municipality and a municipal agency when interpreting the applicable provisions."

Accordingly, while BLM did not abuse its discretion in approving the right-of-way, it did improperly excuse Nenana from payment of fair market rental for use of the subject lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, that part of the decision dismissing the protest to the proposed right-of-way is affirmed; that part of the decision approving the right-of-way for no fee is vacated and the case remanded for a determination of fair market rental for the right-of-way. 6/

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge

6/ Remand does not preclude issuance of the right-of-way subject to a subsequent determination of the fair market rental value. See Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204, 210-11 (1984). However, Nenana must settle any outstanding trespass liability incurred prior to the effective date of the right-of-way.